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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 KAREN HILL and DAVID HILL,

12 Plaintiffs,

13 v.

14 WASHINGTON STATE DEPARTMENT
OF CORRECTIONS; et al.,

15 Defendants.

CASE NO. C08-5202BHS

ORDER ADOPTING REPORT
AND RECOMMENDATION
IN PART AND RESERVING
RULING ON PLAINTIFFS'
CLAIM FOR INJUNCTIVE
RELIEF

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17 This matter comes before the Court on the Report and Recommendation of the
18 Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 43), Plaintiffs'
19 Objections to the Report and Recommendation (Dkt. 44) and the remainder of the record.
20 The Court hereby adopts the Report and Recommendation in part as stated herein, and
21 requests additional briefing.

22 **I. FACTUAL AND PROCEDURAL BACKGROUND**

23 Plaintiffs challenge the Washington State Department of Corrections ("DOC")
24 policy which permits eligible inmates extended family visitation. The governing policy in
25 place at the time of Plaintiffs' complaint was DOC Policy 590.100, Revision Date July
26 11, 2007. Dkt. 1-2, 41-55 (DOC Policy 590.100, Revision Date 7/11/07) (hereafter "pre-
27 revision DOC Policy"). This policy was revised after Judge Strombom filed a Report and
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1 Recommendation. *See* DOC Policy Number 590.100, Revision Date 2/27/09, *available at*
2 <http://www.doc.wa.gov/Policies/showFile.aspx?name=590100> (hereafter “current DOC
3 Policy”).

4 **A. EXTENDED FAMILY VISITS PRIOR TO FEBRUARY 27, 2009**

5 Under the pre-revision DOC Policy, a prisoner could qualify for an Extended
6 Family Visit (“EFV”) under certain conditions. The history of DOC 590.100 is explained
7 as follows:

8 In February 13, 1995, [DOC] 590.100 was revised. The impetus for
9 the new and more stringent revised directive was a serious incident at
10 another correctional facility during an extended family visit. The incident
11 occurred at the Clallam Bay Corrections Center during a family visit on
January 7, 1995. The inmate involved held his spouse at knife point during
an extended family visit, attacked and stabbed her, and held her hostage.
The inmate was shot during the incident.

12 As a result of the Clallam Bay incident, members of the Washington
13 Legislature during the 1995 session introduced a measure that would have
14 completely precluded extended family visitation in Washington prisons.
15 However, instead of passing such a law, the Washington Legislature passed,
16 and the Governor signed, House Bill 2010, containing a provision that
required the Department of Corrections to develop a uniform policy
governing “the privilege of extended family visitation.” *See* RCW
72.09.490.

17 As a result of House Bill 2010, the Division of Prisons revised the
18 directive governing extended family visits, [DOC] 590.100. The revised
19 directive became effective February 13, 1995. As revised, [DOC] Directive
20 590.100 provides that extended family visits for eligible offenders and their
21 immediate families must be approved by the Superintendent, who has the
authority to approve, deny, suspend, or terminate visits. [DOC] 590.100 (“If
it is determined there is a reason to believe that an offender, although he/she
meets all other eligibility requirements, is a danger to him/herself, the
visitor(s), or to the orderly operation of the program, the Superintendent
may exclude the offender from the program.”).

22 The directive further eliminates “maximum, close custody, and death
23 row offenders” from participating in the program, and restricts extended
24 family visits in a number of other categories. The directive includes a
restriction that “[o]ffenders may be excluded from participation if they have
25 a documented history of domestic violence against any person.”
26 Additionally, the directive provides that only those spouses who were
legally married to the offenders prior to incarceration for the current crime
of conviction are eligible for extended family visitation. *Id.*

27 On February 24, 1995, Tom Rolfs, Director of the Division of
28 Prisons, issued and circulated the new EFV directive as well as a policy
statement governing the implementation of the new EFV directive. In the

1 policy statement, Rolfs expressly recognized the extensiveness of the
2 directive's significant revisions and encouraged the superintendents to take
3 the necessary steps to ensure that the revised directive be implemented
4 "with the sensitivity and necessity of its contents in mind." The policy
statement provided two guidelines for implementing the newly revised
directive.

5 The first guideline requires the Prison Superintendents to review
6 each inmate currently approved for participation in the EFV program
7 pursuant to the pre-revision directive to determine if he/she meets the new
8 criteria. It also allows the Superintendent to disapprove any inmate
9 currently participating who failed to meet the revised directive's provisions.

10 The second guideline allows the Superintendents to make one-time
11 exceptions for inmates who do not meet the revised directive's
12 requirements. Specifically, this "grandfathering" provision provides the
13 Superintendents with the discretion to approve inmates who had (1) either
14 already been participating in the program, or had made application to the
15 program prior to January 10, 1995, and (2) were determined not to present
16 safety or security concerns for the program or participants. The
17 "grandfathering" clause does not grant the superintendents discretion to
18 consider any other inmate for participation in the program.

19 *Daniel v. Rolfs*, 29 F. Supp. 2d 1184, 1185-86 (E.D. Wash. 1998). When the *Daniel* court
20 addressed the constitutionality of this policy, the criteria of the grandfathering provision
21 were that the inmate *either* had made application to the program or had already been
22 participating in the program before January 10, 1995.

23 The pre-revision DOC Policy, which was in effect at the time of Plaintiff's
24 complaint, contained the following "grandfathering provision":

25 Offenders who made application *and* were participating in the EFV
26 Program prior to January 10, 1995, may be allowed to continue
27 participation based on the Superintendent's review. Offenders who were
28 grandfathered into the program and lose custody, must reapply and meet
current application criteria. This also applies to parole revocations, CCI
violators and re-incarcerated offenders. Grandfathering is not allowed for
remarriages following a divorce unless authorized by the Prisons Deputy
Secretary.

Pre-revision DOC Policy 590.100, Directive § V(E)(1) (emphasis added). The pre-
revision provision specifically precluded extended visitation privileges to spouses who
married inmates post-conviction. *Id.*, § V(C)(1).

1 **B. CURRENT DOC POLICY**

2 On February 27, 2009, DOC issued the current DOC Policy. The current DOC
3 Policy made several changes to the pre-revision DOC Policy. In particular, the current
4 DOC policy permits an eligible inmate, *see* DOC Policy 590.100 § (V)(A), extended
5 family visitation with a spouse whom the inmate married after formal judgment and
6 sentence if certain conditions are met, *see id.* § (V)(C)(2) and (3).

7 In addition, the current DOC Policy grandfathering provision provides:

8 Offenders who made application or were participating in the EFV
9 Program prior to January 10, 1995, may be allowed to continue
10 participation based on Superintendent review. Offenders who were
grandfathered into the program and demoted in custody must reapply and
meet current application criteria.

11 *Id.*, § (V)(G)(1).

12 **C. PLAINTIFFS' REQUEST FOR EFV**

13 Plaintiffs are a married couple, Karen Hill a free person, and David Hill an inmate
14 incarcerated in the Washington Department of Corrections ("DOC"). Plaintiffs were
15 married on June 20, 2005, which was 40 days after Mr. Hill's conviction. Dkt. 1-2 at 29
16 (Plaintiffs' complaint). Plaintiffs were denied participation in the EFV program because
17 they were married after Mr. Hill was convicted.

18 **D. THE CURRENT PROCEEDINGS**

19 On February 22, 2008, Plaintiffs filed a civil rights complaint in the Superior Court
20 of the State of Washington in and for the County of Thurston. Dkt. 1-2, 28-35. Plaintiffs
21 claim that Defendants' denial of their EFV application is a violation of their right to equal
22 protection of the law under the Fourteenth Amendment. *Id.* at 12-13. On April 2, 2008,
23 Defendants removed the action to this Court. Dkt. 1. Plaintiffs seek damages as well as
24 injunctive relief.

25 On April 9, 2008, Defendants filed a Motion to Dismiss, arguing that Plaintiffs
26 have no constitutional right to participate in the EFV program under DOC Policy
27 590.100. Dkt. 5. This motion was later renoted as a motion for summary judgment.
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1 Defendants maintain that Plaintiffs fail to state an equal protection violation. *Id.*
2 Defendants further maintain that (1) Plaintiffs fail to allege personal participation on the
3 part of Defendants, (2) Plaintiffs' claims against the DOC are barred by the Eleventh
4 Amendment, and (3) even if a constitutional violation occurred, the individual Defendants
5 are entitled to qualified immunity.

6 On January 30, 2009, Judge Strombom issued a Report and Recommendation. Dkt.
7 43. Judge Strombom recommended that the Court grant Defendants' motion because (1)
8 the "grandfathering provision" did not violate Plaintiffs' right to equal protection, (2)
9 Plaintiffs were not eligible for the "grandfathering provision," and (3) Defendants Vail
10 and Pacholke were entitled to summary judgment for lack of personal participation. Judge
11 Strombom did not reach the issue of qualified immunity with regard to Defendant
12 Roberts, who was involved in the denial of Mr. Hill's application, because she concluded
13 that Plaintiffs failed to allege a constitutional violation. Judge Strombom did conclude
14 that Plaintiffs' suit against DOC was barred under the Eleventh Amendment.

15 On February 13, 2009, Plaintiffs filed objections to the Report and
16 Recommendation. Dkt. 44. Plaintiffs specifically object to Judge Strombom's
17 recommendation that Defendants did not violated Plaintiffs' rights to equal protection and
18 argue that Defendants have not put forth a legitimate penological interest for either DOC
19 Policy 590.100 or the "grandfathering provision" of the policy. Plaintiffs also maintain
20 that changes in DOC Policy 590.100, recently revised on February 27, 2009, support their
21 argument that the policy Plaintiffs initially challenged was arbitrary.

22 Plaintiffs raise three additional objections. First, Plaintiffs maintain that
23 Defendants Vail and Pacholke should be held liable because they are public servants and
24 failed to amend the DOC Policy. Second, Plaintiffs contend that no individual Defendant
25 is entitled to qualified immunity because a reasonable person would know that enforcing
26 the DOC Policy violates a clearly established constitutional right. Third, Plaintiffs
27 maintain that DOC is a proper defendant.
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1 On February 27, 2009, Defendants responded. Dkt. 45. On March 10, 2009,
2 Plaintiffs filed a reply, requesting that the Court reject the Report and Recommendation
3 because Defendants fail to explain why Plaintiffs are treated differently than inmates who
4 applied or participated in the EFV program prior to the cut-off date. Dkt. 46.

5 **II. DISCUSSION**

6 **A. STANDARD**

7 The district court “shall make a de novo determination of those portions of the
8 report . . . to which objection is made,” and “may accept, reject, modify, in whole or in
9 part, the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1).
10 The district court “may also receive further evidence” on the issues presented. *Id.*

11 **B. INDIVIDUAL DEFENDANTS**

12 The Court adopts Judge Strombom’s finding that Defendants Vail and Pacholke
13 are entitled to summary judgment for lack of personal participation regarding Plaintiffs’
14 challenge to the pre-revision DOC Policy. Plaintiffs’ argument that Defendants Vail and
15 Pacholke should be held liable because they are public servants and failed to amend the
16 pre-revision DOC Policy is unavailing. Judge Strombom properly addressed this
17 argument in the Report and Recommendation. In addition, even if Defendants had alleged
18 personal participation, Defendants Vail and Pacholke are entitled to qualified immunity as
19 discussed below.

20 Judge Strombom did not reach the issue of qualified immunity because she found
21 that Plaintiffs failed to allege a constitutional violation. Thus, addressing qualified
22 immunity was not necessary. This Court will address qualified immunity because
23 Plaintiffs challenged this issue in their objections.

24 Prior to the Supreme Court’s decision in *Pearson v. Callahan*, 555 U.S. ___, 129
25 S.Ct. 808, 172 L. Ed. 2d 565 (2009), courts were required to first determine whether the
26 plaintiff had alleged facts that demonstrated the violation of a constitutional right, prior to
27 addressing the issue of qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

1 Under *Saucier*, if the court found a violation of a constitutional right, “the next, sequential
2 step [was] to ask whether the right was clearly established . . . in light of the specific
3 context of the case.” *Id.* This sequence, however, is no longer the mandatory procedure
4 that a district court must utilize when considering the shield of qualified immunity. *See*
5 *Pearson*, 129 S. Ct. at 818. Rather, the district court may “determine the order of
6 decisionmaking that will best facilitate the fair and efficient disposition of each case.” *Id.*
7 at 821. Because Plaintiffs here have not demonstrated that Defendants violated any
8 clearly established constitutional right, the Court may resolve Plaintiffs’ claims without
9 addressing the issue of whether a constitutional violation was properly alleged.

10 “[G]overnment officials performing discretionary functions generally are shielded
11 from liability for civil damages insofar as their conduct does not violate clearly
12 established statutory or constitutional rights of which a reasonable person would have
13 known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The immunity is “immunity
14 from suit rather than a mere defense to liability.” *Mitchell v. Forsyth*, 472 U.S. 511, 526
15 (1985).

16 In light of pre-existing law, the unlawfulness of a state actor’s conduct must be
17 apparent in order for that conduct to constitute a violation of “clearly established law.”
18 *See Anderson v. Creighton*, 435 U.S. 635 (1987). The plaintiff bears the burden of
19 proving the “fact-specific” right was clearly established at the time of the alleged
20 violation so that a reasonable official would have understood that his or her conduct
21 violated that right. *Id.* at 638.

22 The Court concludes that Defendants Vail, Pacholke, and Roberts are entitled to
23 qualified immunity with regard to all of Plaintiffs’ claims for damages, fees, and costs for
24 Defendants’ enforcement of both the pre-revised DOC Policy and the current DOC
25 Policy. Although Plaintiffs argue that a reasonable person would know that enforcing the
26 DOC Policy violates a clearly established constitutional right, they fail to show that the
27 DOC Policy, in light of pre-existing law, violates any right guaranteed by the
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1 Constitution. In other words, even if Plaintiffs had alleged a violation of a constitutional
2 right, the DOC Policy did not violate any clearly established constitutional right.¹

3 **C. ELEVENTH AMENDMENT IMMUNITY**

4 The Court also adopts Judge Strombom's finding that the Eleventh Amendment
5 bars Plaintiffs' suit against the DOC. Dkt. 42, 12-13. Judge Strombom properly rejected
6 Defendants' argument that *In re Lazar*, 237 F.3d 967 (9th Cir. 2001), supports their
7 assertion that the DOC waived immunity by removing Plaintiffs' action to federal court.
8 *Id.* at 13.

9 The Court notes that Plaintiffs also sought injunctive relief. Dkt. 1-2 at 34. Under
10 the doctrine of *Ex Parte Young*, 209 U.S. 267, 289 (1908), prospective relief against a
11 state official in his or her official capacity to prevent future federal constitutional or
12 federal statutory violations is not barred by the Eleventh Amendment. This doctrine
13 appears to apply to this case. Judge Strombom implicitly (and properly) dismissed
14 Plaintiffs' claim for injunctive relief because she found that the pre-revised DOC Policy
15 did not violate Plaintiffs' constitutional rights.

16 As discussed above, the DOC revised the challenged policy after Judge Strombom
17 issued the Report and Recommendation. Therefore, the Court should not determine
18 whether Plaintiffs have pled a cognizable claim for injunctive relief based on the current
19 DOC Policy until Plaintiffs have had an opportunity to address this issue.

20 The only proper defendant to this claim is Defendant Vail in his capacity as
21 Secretary of the DOC. *See, e.g., Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (claim for
22 prospective relief against a state agency barred by Eleventh Amendment); and *Greenwalt*
23 *v. Ind. Dep't of Corr.*, 397 F.3d 587, 589 (7th Cir. 2005) (to allege claim for injunctive
24 relief against state agency, a plaintiff must name the state official responsible for
25 enforcing the contested policy in his or her official capacity).

26
27 ¹ In any event, this Court previously found that the pre-revision DOC Policy did not
28 violate any constitutional right. *Lowden v. Miller-Stout*, C08-5365BHS, Dkt. 63.

1 **D. CONCLUSION**

2 The Court overrules Plaintiffs' objections to Judge Strombom's Report and
3 Recommendation with regard to all of Plaintiffs' claims challenging the pre-revised DOC
4 Policy.

5 However, in light of the revision of the challenged DOC Policy, Plaintiffs may file
6 additional briefing on the issue of whether they are entitled to injunctive relief from the
7 current DOC Policy 590.100. Plaintiffs may file briefing no later than May 1, 2009.
8 Defendants may respond to Plaintiffs briefing on or before May 8, 2009. If Plaintiffs fail
9 to file, the Court will address Defendants' Motion for Summary Judgment based on the
10 current status of the record.

11 The only remaining defendant in this case is Defendant Vail.

12 **III. ORDER**

13 Therefore, it is hereby


14 **ORDERED** that Plaintiffs' Objections (Dkt. 44) are **OVERRULED** and the
15 Report and Recommendation (Dkt. 43) is **ADOPTED in part**, as follows:

16 1. Plaintiffs' claims for damages based on the pre-revision DOC Policy or
17 current DOC Policy are **DISMISSED**;

18 2. Plaintiffs may file additional briefing on the question of whether they are
19 entitled to injunctive relief under the current DOC Policy as stated herein. The Court
20 reserves ruling as to Plaintiffs' claims for injunctive relief.

21 3. The Report and Recommendation is **RENOTED** for May 8, 2009.

22 DATED this 31st day of March, 2009.

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25 
26 BENJAMIN H. SETTLE
27 United States District Judge
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